Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-65–10 OF 2015(W)
RAUS SHARIF CHIEF JUSTICE, AHMAD MAAROP CJ (MALAYA), AZAHAR MOHAMED, ZAHARAH IBRAHIM AND PRASAD ABRAHAM FCJJ
29 NOVEMBER 2017

Legal Profession — Misconduct — Acting in a manner unbefitting of an advocate and solicitor — Advocates and Solicitors Disciplinary Board struck off two lawyers from the Rolls for committing misconduct under s 94(3)(o) of the Legal Profession Act 1976 ('the LPA') — Whether it was tenable for affected lawyers to argue that they should not have been subjected to disciplinary proceedings as they did not perform acts complained of while acting as advocates and solicitors but only as trustee of fund or director of company — Whether word 'otherwise' in phrase 'professional capacity or otherwise' in s 94(3) of the LPA wide enough to include acts or omissions in any capacity other than as advocate and solicitor — Whether practising advocate and solicitor's improper act or omission while acting as trustee or company director could amount to 'acting in manner unbefitting of advocate and solicitor' and be 'misconduct' under s 94(3)(o) of the LPA — Whether punishment of striking off from Rolls appropriate in all circumstances of case

The instant appeal followed the dismissal of the appellants' appeals to the High Court and the Court of Appeal against an order that they be struck off the Rolls of Advocates and Solicitors. The order was made by the disciplinary board ('DB') under the Legal Profession Act 1976 ('the LPA') at the conclusion of disciplinary proceedings taken against the appellants. The first appellant ('Dinesh') was the son of the second appellant ('Kanawagi') and at all material times both were partners of the legal firm, Messrs Khana & Co. The firm represented several *orang asli* in obtaining an order against the Johor State Government for payment of compensation for the acquisition of their ancestral lands. Pursuant to that order, the Johor State Government paid RM38.5m to Messrs Khana & Co. The money was put into a trust fund managed by trustees, one of whom was Kanawagi. Some years later, the *orang asli* beneficiaries of the trust fund engaged the respondent ('Ragumaren') to sue, among others, Kanawagi and his firm for breaches of trust and constructive trust alleging that they had only received a portion of the compensation monies and could not obtain any details or information regarding the rest of the monies from any of the trustees including Kanawagi. In their suit, the plaintiffs sought an explanation for the withdrawal of about RM11.6m from the trust fund to pay 'fees and expenses'. They also wanted to know what had happened to the

remaining RM22m and how much interest it had earned. By way of interim relief, the High Court suspended Kanawagi as a trustee of the fund, restrained him and his firm from dissipating the trust fund and appointed a receiver and manager ('R&M') to manage the trust fund and investigate if any irregularities had taken place. The High Court later found from affidavit evidence that the appellants had refused to co-operate with the R&M in defiance of its order and that there was a real risk of the trust monies being dissipated. Based on the High Court's observations and its rulings and also based on the R&M's reports (which was accepted by the court), Ragumaren, on behalf of one of the *orang asli* beneficiaries ('Saling') lodged a complaint with the DB against the appellants and two others. The complaint alleged that Kanawagi had unlawfully allowed RM7m to be withdrawn from the trust fund and that the appellants had used that sum to increase the paid-up capital of a company ('VPSB') in which they were shareholders. VPSB had subsequently paid out that sum as loans to its directors. In their joint letter of explanation to the DB, the appellants argued that disciplinary proceedings should not have been taken against them as they did not carry out the acts complained of in their capacity as advocates and solicitors, but as a trustee of the trust fund (in Kanawagi's case) and as a shareholder cum director of VPSB (in Dinesh's case). At the conclusion of its hearings into the complaint, the disciplinary committee ('DC') ruled that there was sufficient merit in the complaint against the appellants and the capacities in which they had acted did not detract from the fact that they were at all times practising advocates and solicitors. The DC took cognisance of the High Court's finding that in acting against the interests of their *orang asli* clients in relation to the trust fund and trust property the appellants had committed professional misconduct. In the instant appeal, the appellants re-visited the argument that they had not carried out the acts complained of in their capacity as advocates and solicitors (and therefore the disciplinary proceedings ought not to have been taken against them) but also argued that the DC: (a) had failed to appreciate the fact that Ragumaren had merely filed the complaint for and on behalf of Saling as his lawyer and that Saling himself never attended the DC hearing to give evidence or be subjected to cross-examination; (b) came to its conclusion by relying on an interlocutory judgment of the High Court; and (c) failed to appreciate that none of the complaints by Saling was proven beyond reasonable doubt.

Held, dismissing Kanawagi's appeal and allowing Dinesh's appeal in part by varying the order of the DB to read that he be suspended from practice for a period of five years from 7 July 2012:

(1) On considering the report of the DC, the court found that there were no compelling grounds to interfere with its findings. There was nothing to indicate unfairness in terms of procedure and the manner in which the DC had conducted itself. The court should only interfere with the finding of facts and recommendations of the DC: (i) when the findings

were manifestly perverse; (ii) the DC/DB had failed as right-thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against; and (iii) there had been a breach of natural justice. While this list of exceptions might not be exhaustive and it depended on the facts of each given case, the Court of Appeal did not exceed its jurisdiction when it did not interfere with the findings of the DC and the DB in the instant case and therefore no curial intervention was warranted (see paras 14 & 23–24).

(2) The DC and/or like bodies, being a collegiate of peers, must be allowed to make findings of fact based on their experience in the profession under any given circumstances. The court must not substitute itself in the position of the DC in its review role. It was not for the court to say on the facts that the offending solicitor was guilty of professional misconduct or otherwise. Arguments on the merits should not be enunciated by the court and strong credence must be given to the findings of the DC, which, after all, was subject to review by the DB which also consisted of peers (see para 22).

(3) In assessing misconduct in the instant case, the DC was perfectly entitled to rely on the observations/comments made by the High Court judge as the DC was conducting an inquiry into the alleged misconduct of the appellants. From a perusal of the DC's report and its recommendations, there appeared to be no reference to the higher standard of proof (beyond reasonable doubt) required to establish 'misconduct' under s 94(3) of the LPA. The appellants' peers as the DC and the DB were the best persons to decide on the misconduct of the appellants and whether the standard of proof in any given case had been met (see paras 16 & 25).

(4) Section 103C(1) of the LPA set out the procedure the DC was required to follow in conducting its proceedings. The DC was the 'master of its own procedure' subject to statutory provisions and rules. The power to call persons to appear before it to give oral evidence in relation to a complaint vested with the DC. If it felt the actual complainant needed to give oral evidence, then it was the prerogative of the DC to call him/her to testify. The DC was perfectly entitled to rely on the documents before it to come to its findings and recommendations (see paras 13–14).

(5) Section 94(3) of the LPA defined 'misconduct' and the key words were 'or otherwise which amounts to grave impropriety'. The word 'otherwise' in the phrase 'in a professional capacity or otherwise' was wide enough to include acts or omissions in any capacity other than as an advocate and solicitor. In any event, the term 'misconduct' was expanded in meaning to include the circumstances set out in paras (a)–(o) of s 94(3) of the LPA. When a practising advocate and solicitor acted as a trustee or director of a company and allegations of breach of trust and/or fiduciary duty and/or conspiracy were levelled against him, then if the DC found him guilty of

conduct unbefitting of an advocate and solicitor in relation to such trust and/or duty (see s 94(2) of the LPA) he would certainly come within para (o) of s 94(3) of the LPA. Under that paragraph, conduct unbefitting of an advocate and solicitor came within the definition of 'misconduct' (see paras 26 & 29).

(6) Having given due consideration to Dinesh's role in the scheme, the court was of the view the principle of proportionality in meting out sentences applied. The DC and DB were harsh in their recommendation and order that Dinesh be struck off the Rolls. It was hereby ordered that Dinesh be suspended for five years rather than be struck off the Rolls (see paras 31 & 33).

Obiter:

The court would urge the DC in recommending the punishment to be meted out to give brief reasons as to why the DC had recommended the particular punishment meted out bearing in mind the DC had options available, and the courts must be in a position to examine the same to decide whether the pendulum for punishment had swung too far in favour of striking off the Rolls (see para 34).

[Bahasa Malaysia summary

Rayuan ini mengikut penolakan rayuan-rayuan perayu-perayu kepada Mahkamah Tinggi dan Mahkamah Rayuan terhadap perintah bahawa mereka dibatalkan daripada Daftarai Penguambela dan Peguamcara. Perintah itu telah dibuat oleh lembaga tatatertib ('LT') di bawah Akta Profesion Undang-Undang 1976 ('APU') pada kesimpulan prosiding tatatertib yang diambil terhadap perayu-perayu. Perayu pertama ('Dinesh') adalah anak lelaki perayu kedua ('Kanawagi') dan pada setiap masa matan kedua-duanya rakan kongsi firma guaman, Tetuan Khana & Co. Firma itu telah mewakili beberapa orang asli untuk memperoleh perintah terhadap Kerajaan Negeri Johor untuk pembayaran pampasan bagi pengambilalihan tanah nenek moyang mereka. Berikutan perintah tersebut, Kerajaan Negeri Johor telah membayar RM38.5 juta kepada Tetuan Khana & Co. Wang itu telah diletakkan ke dalam dana amanah yang diuruskan oleh pemegang-pemegang amanah salah seorangnya adalah Kanawagi. Beberapa tahun kemudian, benefisiari-benefisiari orang asli kepada dana amanah itu telah melantik responden ('Ragumaren') untuk menyaman, antara lain, Kanawagi dan firmanya kerana pelanggaran-pelanggaran amanah dan amanah konstruktif dengan mengatakan bahawa mereka hanya menerima sebahagian daripada wang pampasan itu dan tidak boleh mendapatkan apa-apa butiran atau maklumat berkenaan wang lain daripada mana-mana pemegang-pemegang amanah itu termasuk Kanawagi. Dalam guaman mereka, plaintif-plaintif telah memohon penjelasan untuk pengeluran sejumlah lebih kurang RM11.6 juta daripada dana amanah itu untuk membayar 'fees dan expenses'. Mereka juga ingin mengetahui apa yang berlaku kepada baki RM22 juta dan jumlah faedah yang

telah diperolehinya. Melalui relif interim, Mahkamah Tinggi telah menggantung Kanawagi sebagai pemegang amanah dana itu, menghalangnya dan firmanya daripada melesapkan dana amanah itu dan melantik penerima dan pengurus ('P&P') untuk menguruskan dana amanah itu dan menyiasat jika apa-apa luar aturan telah berlaku. Mahkamah Tinggi kemudian mendapati daripada keterangan afidavit bahawa perayu-perayu telah enggan bekerjasama dengan P&P bertentangan dengan perintahnya dan bahawa terdapat risiko sebenar yang wang amanah itu dilesapkan. Berdasarkan penelitian dan keputusan Mahakamh Tinggi dan juga berdasarkan laporan-laporan P&P (yang telah diterima oleh mahkamah), Ragumaren, bagi pihak salah seorang daripada benefisiari orang asli itu ('Saling') telah membuat aduan dengan LT terhadap perayu-perayu dan dua yang lain. Aduan itu mengatakan bahawa Kanawagi telah secara tidak sah membuat pengeluaran daripada dana amanah itu dan bahawa perayu-perayu telah menggunakan jumlah tersebut untuk menambah modal berbayar sebuah syarikat ('VPSB') yang mana mereka adalah pemegang-pemegang saham. VPSB kemudian telah membayar jumlah tersebut sebagai pinjaman kepada pengarah-pengarahnya. Dalam surat penjelasan bersama mereka kepada LT itu, perayu-perayu berhujah bahawa prosiding tatatertib tidak patut diambil terhadap mereka kerana mereka tidak melakukan perbuatan-perbuatan yang diadukan dalam kapasiti mereka sebagai peguambela dan peguamcara, tetapi sebagai pemegang amanah dana amanah (dalam kes Kanawagi) dan sebagai pemegang saham juga pengarah VPSB (dalam kes Dinesh). Pada akhir perbicaraannya berhubung aduan itu, jawatankuasa tatatertib ('JT') memutuskan bahawa terdapat merit yang mencukupi dalam aduan terhadap perayu-perayu dan kapasiti yang mereka bertindak tidak mengurangkan daripada fakta bahawa mereka telah pada setiap masa peguambela dan peguamcara yang beramal. JT mengambil maklum tentang dapatan Mahkamah Tinggi bahawa dalam bertindak bertentangan kepentingan anakguam orang asli mereka berkaitan dana amanah dan hartanah amanah perayu-perayu telah melakukan salah laku profesional. Dalam rayuan ini, perayu-perayu telah melihat semula hujah bahawa mereka tidak melakukan perbuatan yang diadukan dalam kapasiti mereka sebagai peguambela dan peguamcara (dan oleh itu prosiding tatatertib tidak patut diambil terhadap mereka) tetapi juga berhujah bahawa JT itu: (a) telah gagal sebagai peguam dan bahawa Saling sendiri tidak pernah menghadiri perbicaraan JT untuk memberi keterangan atau dipanggil untuk pemeriksaan balas; (b) tiba kepada kesimpulannya dengan bergantung kepada penghakiman interlokutori Mahkamah Tinggi; dan (c) gagal menghayati bahawa tiada antara aduan oleh Saling telah dibuktikan melampaui keraguan munasabah.

Diputuskan, menolak rayuan Kanawagi dan membenarkan sebahagian rayuan Dinesh dengan mengubah perintah LT dibaca bahawa dia digantung dari amalan bagi tempoh lima tahun mulai 7 Julai 2012:

(1) Dengan mengambil kira laporan JT mahkamah mendapati bahawa tiada alasan kuat untuk campur tangan dengan dapatannya. Tiada apa untuk menunjukkan ketidakadilan dari segi prosedur dan cara JT itu melaksanakannya. Mahkamah patut hanya campur tangan dengan dapatan fakta dan syor JT: (i) apabila dapatan itu nyata sesat; (ii) JT/LT telah gagal sebagai ahli berfikiran waras Badan Peguam untuk memberikan pertimbangan sewajarnya kepada fakta kes dan perbuatan peguamcara yang diadukan terhadapnya; dan (iii) terdapat pelanggaran keadilan asasi. Di mana senarai pengecualian ini mungkin tidak melampaui bidang kuasanya apabila ia tidak campur tangan dengan dapatan JT dan LT dalam kes ini dan oleh itu tiada campur tangan kurial adalah wajar (lihat perenggan 14 & 23–24).

(2) JT dan/atau badan-badan sepertinya, sebagai rakan seangkatan dengannya, harus dibenarkan membuat dapatan fakta berdasarkan pengalaman mereka dalam profesion di bawah apa-apa keadaan yang diberikan. Mahkamah tidak boleh menggantikan dirinya dalam kedudukan JT dalam peranan semakan semulanya. Ia bukan untuk mahkamah untuk mengatakan tentang fakta itu bahawa peguamcara yang bersalah adalah bersalah kerana salah laku atau sebaliknya. Hujah berdasarkan merit tidak boleh dinyatakan oleh mahkamah dan kepercayaan yang kuat perlu diberikan kepada dapatan JT, yang mana, apa-apa pun, adalah tertakluk kepada semakan semula oleh LT yang juga terdiri daripada rakan seangkatannya (lihat perenggan 22).

(3) Dalam menilai salah laku dalam kes ini, JT memang berhak untuk bergantung kepada penelitian/ulasan yang dibuat oleh hakim Mahkamah Tinggi kerana JT telah menjalankan siasatan berhubung salah laku yang dikatakan oleh perayu-perayu. Berdasarkan penelitian laporan KT dan syornya, ia kelihatan tiada rujukan kepada piawai bukti yang lebih tinggi (melampaui keraguan munasabah) yang dikehendaki untuk membuktikan 'misconduct' di bawah s 94(3) APU. Rakan seangkatan perayu-perayu sebagai JT dan LT adalah orang-orang yang terbaik untuk memutuskan tentang salah laku perayu-perayu dan sama ada piawai bukti dalam apa-apa keadaan yang diberikan telah dipenuhi (lihat perenggan 16 & 25).

(4) Seksyen 103C(1) APU menetapkan prosedur JT yang dikehendaki untuk ikut dalam menjalankan prosidingnya. JT adalah 'master of its own procedure' tertakluk kepada peruntukan statutori dan peraturan. Kuasa untuk memanggil orang-orang untuk hadir di hadapannya bagi memberikan keterangan lisan berkaitan aduan yang terletak kepada JT. Jika ia merasakan pengadu sebenar perlu memberikan keterangan lisan, maka ia adalah prerogatif JT untuk memanggilnya memberi keterangan. JT memang berhak untuk bergantung kepada dokumen-dokumen di

hadapannya untuk tiba kepada dapatan dan syornya (lihat perenggan 13–14).

(5) Seksyen 94(3) APU mentafsir 'misconduct' dan kata-kata kunci adalah 'or otherwise which amounts to grave impropriety'. Perkataan 'otherwise' dalam ungkapan 'in a professional capacity or otherwise' adalah cukup luas untuk termasuk perbuatan atau peninggalan dalam apa-apa kapasiti selain daripada sebagai peguambela dan peguamcara Dalam apa keadaan, istilah 'misconduct' telah diperluaskan maksudnya untuk termasuk keadaan yang dinyatakan dalam perenggan-perenggan (a)–(o) kepada s 94(3) APU. Apabila peguambela dan peguamcara yang beramal bertindak sebagai pemegang amanah atau pengarah syarikat dan pengataan tentang pelanggaran amanah dan/atau kewajipan fidusiari dan/atau konspirasi dibuat terhadapnya, maka jika JT mendapatinya bersalah kerana perbuatan yang tidak sepatutnya oleh seorang peguambela dan peguamcara berkaitan amanah dan/atau kewajipan (lihat s 94(2) APU) dia sememanganya terjatuh di bawah perenggan (o) kepada s 94(3) APU. Di bawah perenggan tersebut, perbuatan yang tidak sepatutnya oleh seorang peguambela dan peguamcara terjatuh di bawah tafsiran 'misconduct' (lihat perenggan 26 & 29).

(6) Setelah mempertimbangkan peranan Dinesh dalam skim itu, mahkamah berpendapat prinsip perkadaran dalam membuat hukuman adalah terpakai. JT dan LT terlalu berat dalam syor mereka dan memerintahkan Dinesh dibatalkan dari Daftarai. Oleh itu adalah diperintahkan agar Dinesh digantung selama lima tahuan dan bukan dibatalkan dari Daftarai (lihat perenggan 31 & 33).

Obiter:

Mahkamah akan menggesa JT dalam mensyorkan hukuman dikenakan untuk memberikan sebab-sebab kenapa JT mensyorkan hukuman tertentu itu dikenakan dengan mengambil kira JT mempunyai pilihan tersedia, dan mahkamah perlu dalam kedudukan untuk memeriksa yang sama bagi memutuskan sama ada hukuman yang dibuat terlalu berat hingga menyebelahi pembatalan dari Daftari itu (lihat perenggan 34).

Notes

For cases on acting in a manner unbefitting of an advocate and solicitor, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1726–1727.

Cases referred to

A Solicitor, In re [1956] 1 WLR 1312, QBD (refd)

Au Kong Weng v Bar Committee, Pahang [1980] 2 MLJ 89, FC (refd)

Bar Council of Andhra Pradesh v Kurapati Satyanarayana Civil Appeal 3412 of 2001, SC (refd)

Bolton v Law Society [1994] 2 All ER 486, CA (refd)

Council of the Institute of Chartered Accountants of India v Ved Prakash Verma

And Anr Chat A Ref 5/2012, HC (refd)
Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341 (refd)
Gopalan Nair, Re [1993] 1 SLR 375; [1992] 2 SLR (R) 969, HC (refd)
Jerald Allen Gomez v Shencourt Sdn Bhd (Majlis Peguam, intervenor) [2006] 2 MLJ 343; [2006] 1 CLJ 88, HC (refd)
Law Society v Waddingham [2012] EWHC 1519 (Admin), QBD (refd)
Law Society of Singapore v Heng Guan Hong Geoffrey [2000] 1 SLR 361; [1999] 3 SLR (R) 966, HC (refd)
Majlis Peguam Malaysia v Hari Krishnan a/l Jeyapalan [2017] 1 MLJ 770, CA (refd)
Salsbury v Law Society [2008] EWCA Civ 1285, CA (refd)
Sundarajan Sokalingam v Fredrick Indran XA Nicholas; Badan Peguam Malaysia (intervener) [2015] MLJU 2327, CA (refd)
Threlfall v General Optical Council [2004] EWHC 2683 (Admin), QBD (refd)
Weare, A Solicitor, In Re [1893] 2 QB 439, CA (refd)

Legislation referred to

Legal Profession Act 1976 ss 94(2), (3), (3)(a), (3)(b), (3)(c), (3)(d), (3)(e), (3)(f), (3)(g), (3)(h), (3)(i), (3)(j), (3)(k), (3)(l), (3)(m), (3)(n), (3)(o), 103B(1), (1A), (2), 103C, 103C(1)
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 rr 24, 26, 26(2)

Appeal from: Civil Suit No W-02–1455–06 of 2013 (Court of Appeal, Putrajaya)

Bastian Vendargon (Gene Vendargon and Dinesh Athinarayanan with him) (Dinesh & Co) for the first appellant.
Manjeet Singh Dhillon (Shopna Malakar with him) (Shopna Rani Malakar) for the second appellant.
Ragunath Kesavan (G Ragumaren & Co) for the respondent.
Lambert Rasa-Ratnam (Hoi Jack S'ng and Lilian Lee with him) (Lee Hishammuddin Allen & Gledhill) for the intervener.

Prasad Abraham FCJ (delivering judgment of the court):

INTRODUCTION

[1] This appeal was heard by this court on 30 August 2017 wherein the court reserved judgment. We now deliver below our decision and judgment.

BACKGROUND FACTS

[2] The first and second appellants were ordered to be struck off the Rolls of Advocates and Solicitors by the disciplinary board at the conclusion of

disciplinary proceedings taken against them under the Legal Profession Act 1976 ('the LPA'). Their appeals to the High Court and Court of Appeal were dismissed.

[3] The pertinent facts leading up to the disciplinary proceedings being commenced against the first and second appellants are elucidated from the grounds of the learned High Court judge:

[1] Kanawagi is the father of Dinesh and both were then partners of Messrs Khana & Co (Khana & Co).

[2] The respondent is the complainant in the disciplinary proceedings taken by the DB against Kanawagi and Dinesh ('the appellants'). The complaint was made by the respondent on behalf of one Saling bin Lau Bee Chiang, an *orang asli* from Kota Tinggi Johor, a beneficiary of the Lembah Linggui Valley Trust Fund ('trust fund').

[3] Saling and other *orang asli* from three villages had on 5 June 2000 obtained judgment against the Johor State Government which was ordered to pay compensation for the acquisition of their ancestral land. Khana & Co were the solicitors representing the said *orang asli* ('beneficiaries') in the claim regarding the compensation. Pursuant to that judgment, a total sum of RM38.5m was paid out to Khana & Co by the Johor State Government.

[5] In 2005, the respondent was appointed to represent the *orang asli* who alleged that although they did receive some monies from the trust fund, they could not obtain any details nor any correct financial information from the trustees which included Kanawagi with regards to the compensation monies. The respondent then, on their instruction, for an on behalf of these *orang aslis* filed a suit in the Johor Bahru High Court ('Saling Suit') against, inter alia, Kanawagi and Khana & Co for breach of trust and constructive trust in request of the compensation monies. The relief sought, inter alia, are as follows:

(a) the explanation for the sum of RM16,554,111.92 taken from trust monies as alleged fees and expenses;

(b) the status and explanation to the balance of RM22m; and

(c) the status and accounts of the accrued interest on the RM22m.

[6] The learned Vernon Ong JC (as he then was) had granted the *orang asli* interim relief as follows:

(a) suspension of Kanawagi as trustee of the trust fund;

(b) to restrain the defendants (Kanawagi, Khana & Co) from dissipating the trust assests and the judgment sum; and

(c) to forthwith appoint a receiver and manager (hereinafter referred to as 'R&M') to manage the trust and to investigate into the matters pertaining to the compensation monies.

[7] The appellants' appeal against the interim relief was dismissed by the Court of Appeal and their leave application at the Federal Court was withdrawn at the 11th

hour. A subsequent application to remove the receiver and manager was also dismissed by the High Court as well as the Court of Appeal.

[8] On 7 March 2011, the respondent lodged the complaint with the DB on behalf of Saling against the appellants and two others. The complaint pertains to the withdrawal and unlawful use of the RM7m of the trust fund monies, which amount was allegedly used for the appellants benefit and enrichment and not for the benefit of the *orang asli*. Briefly the complaint states:

(a) Kanawagi unlawfully allowed the released of the sum of RM7m;

(b) both appellants unlawfully entered into a self-dealing arrangement not for the benefit of the trust fund or the beneficiaries of the trust fund;

(c) both appellants unlawfully utilised the sum of RM7m (which Kanawagi claimed was used to purchase the condominiums) to increase the paid up capital of Virgin Properties Sdn Bhd ('VPSB'), in which both appellants are shareholders, holding about 49% of its shares and Dinesh is a director; and

(d) as advocates and solicitors, both appellants failed to discharge their duties with honesty, ethics and responsibility.

[9] The complaint in (a) is essentially based on the judgment of Vernon Ong JC (as he then was) which was affirmed by the Court of Appeal. The complaints in (b) and (c) primarily rely on the reports of the R & M which was accepted in the judgment affirmed by the Court of Appeal. The complaints are that:

(a) the sum of RM7m purportedly used for the purchase of the condominiums was in fact utilised by VPSB to increase its paid-up share capital from RM30,000 to RM7,030,000;

(b) at some point later a sum of RM6,999,990 left the account of VPSB as loans to its directors.

[10] In their joint letter of explanation as shown at pp 329–344 of the record of appeal, the appellant claimed, inter alia:

(a) Kanawagi was acting in his capacity as a trustee and not as an advocate and solicitor, within the powers conferred on him under the trust deed and cannot therefore be cited for misconduct; and

(b) Dinesh was acting in his personal capacity as a shareholder and director of VPSB, and not as an advocate and solicitor, and cannot therefore be cited as misconduct. He is not a trustee and therefore cannot be said to have been involved in a self-dealing arrangement. Even if he is a trustee, the trust deed allows the trustees to act notwithstanding personal interest.

[11] The disciplinary copmmittee ('DC') heard the complaint on 25 April 2012 and in their report dated 4 May 2012 as shown at pp 634–635 of the record of appeal, had decided as follows:

> After hearing the arguments from the complainant and the respondents and having read the complaint and the replies and having considered and studied the Johor Bahru High Court Judgment and having read the voluminous facts and

exhibits disclosed in the complaint, the Committee decides as follows:

(a) the four (4) respondents' contention that the Director of the Disciplinary Board shall not register the complaint in the registrar book on the ground that the complaint must be signed by the complainant himself i.e. Saling Bin Lam Bee Chiang and not by his solicitor is groundless. Pursuant to the Legal Profession (Disciplinary Procedure) (Investigating Tribunal and Disciplinary Committee Rules, 1984 Rule 3(1), a complaint can be made by a complainant or his solicitor. And as the complaint is made by the solicitor on behalf of the complainant, the solicitor in our view can sign on behalf of the complainant. We agree with the complainant's explanation.

(b) The 1st respondent's (Kanawagi) contention that the complaint against him for misconduct as advocate & solicitor should not be dealt with by the Disciplinary Board because he acted in his capacity as trustee and not as an advocate and solicitor is in our opinion not tenable by virtue of his standing and position as an advocate and solicitor who acted for the 52 Orang Asli in their compensation claim against the Johor State Government.

The 1st respondent (Kanawagi) and his law firm M/s Khana & Co, the defendants in the Johor Bahru High Court Civil Suit, were found to have acted against the interests of the complainant and 77 others (the plaintiffs in the suit) as held by the Johor Bahru High Court. By acting against the interest of their clients, they are in breach of professional misconduct.

There is valid and sufficient merit in the complaint against the 1st and 2nd respondents (Kanawagi and Dinesh). Both cannot divorce their standing as advocates and solicitors and their personal dealings. The Committee took cognisance of His Lordship's conclusion in summing up his judgment on the serious misconduct of both respondents who acted in their professional and personal dealings unbefitting of advocates and solicitors pertaining to the trust and the trust property.

ARGUMENTS RAISED BY THE APPELLANTS

[4] We note that the principal grounds being canvassed by the first and second appellants duplicate themselves in the main save for some differences with regards to the second appellant. We shall deal with the same accordingly.

[5] The first ground of appeal, common to both appellants is expressed in the following terms (A) (see p 5 of the first appellant's submissions).

A. DC which concluded the inquiry did not keep a record of the proceedings before it as required by r 24 of the Rules 1994 and did not forward the record of the investigating proceedings to the Director as required under r 26(2) of the Rules 1994

[6] The appellants firstly argued that the disciplinary committee ('DC') did not keep a record of proceedings of the inquiry and failed to forward the record of investigation proceedings to the director of complaints as required by r 26(2) of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ('the Rules 1994'). The respondent and the intervener (Malaysian Bar) in their respective submissions and submissions in reply point out that there was no requirement in law to do so and the requirement if at all came by way of an amendment to the LPA which was not applicable in our present appeal. We firstly set out rr 24 and 26 of the Rules 1994:

> 24 Record of proceedings before Disciplinary Committee
>
> The Disciplinary Committee shall make a record of all the evidence given before it.
>
> 26 Report of Disciplinary Committee
>
> (1) The *report* of the Disciplinary Committee shall state the findings of fact and the recommendations of the Disciplinary Committee and shall be signed by the chairman and the members of the Disciplinary Committee.
>
> (2) The *report* of the Disciplinary Committee together with the record of investigation proceedings shall be sent to the Director within two months from the date of the appointment of the Disciplinary Committee. (Emphasis added.)

[7] Looking at s 103B(1) of the LPA which we now set out in toto, and we quote:

> 103B Disciplinary Committee
>
> (1) The Disciplinary Board shall appoint a Disciplinary Committee to consider, in cases where an Investigating Tribunal has been appointed, the report of the Investigating Tribunal, *or to investigate and make recommendations to the Disciplinary Board* in respect of cases under section 103A.

it is clear to us, this exercise by the DC is one of an inquiry and what the DC is required to do is to make a finding expeditiously. Section 103B(2) of the LPA provides the powers afforded to the DC in carrying out its inquiry and it remains the prerogative of the DC whether to call any person to give oral evidence if it deems necessary. The DC pursuant to s 103C of the LPA after the conclusion of its inquiry should record its findings in relation to the facts of the case and make recommendations to the DB as the section so provides.

[8] The appellants argued there was non-compliance with rr 24 and 26 of the Rules 1994. The DC's report appears at p 347 of the common core bundle ('CCB') between respondent and Malaysian Bar. The report of the DC had findings of liability, a consideration of all the evidence and documents placed before it and the DC's recommendations. We find the DC report complied with the relevant provisions of the LPA and all the relevant facts had been recorded. We therefore rule a proper record of proceedings had been forwarded

to the Director of Complaints to be forwarded to the DB in accordance with the provisions of the LPA and the rules and regulations made thereunder and we therefore are unable to agree with this ground of the appellants.

[9] We note that r 26 does not prescribe the form of the record of proceedings to be kept by the DC. The requirement in s 103B(1A) for the DC to keep notes of proceedings was inserted into the LPA on 13 June 2014 *after* the DC's proceedings, and therefore not applicable to this case. We refer to a decision of the Court of Appeal in *Jerald Allen Gomez v Shencourt Sdn Bhd (Majlis Peguam, intervenor)* [2006] 2 MLJ 343; [2006] 1 CLJ 88 wherein His Lordship Abdull Hamid Embong JCA (as he then was) held:

> [5] *Where a domestic body such as the disciplinary committee exercises its power for which the procedures in its proceedings are not provided for by law, the court will assume that in following its ad hoc procedure, the domestic body has exercised that power in a regular manner. The only requirement is that there be no violation of the rules of natural justice.* To say, as in the instant case, that the disciplinary committee should adhere strictly to the procedures as in the proceedings of a criminal court, would be to imply requirements not intended by statute. It would also entail unnecessary delay in a procedure under Part VII of the Legal Profession Act 1976, which is designed to be fairly summary. (Emphasis added.)

[10] We also refer to the decision of the Court of Appeal in *Sundarajan Sokalingam v Fredrick Indran XA Nicholas; Badan Peguam Malaysia (intervener)* [2015] MLJU 2327 wherein Abdul Wahab Patail JCA held at para 23 and we quote in agreement:

> [23] *The scheme of the LPA and its rules is that (a) there is an inquiry by the DC (s 103B), leading to its report containing, inter alia, its findings and recommendations, being submitted to the DB, (b) the decision of the DB*, regardless whether it accepts or rejects the report, is made after a consideration of the report by the DC, and (c) if the DB intends to make an order that is likely adverse against an advocate and solicitor, he is notified of the DB's intention to do so and he is afforded a reasonable opportunity to be heard. *These are fundamental foundations for well-considered, fair and just decisions, eliminating as far as possible decisions that are precipitate, hasty, reckless, impetuous, irrational or worse, where a person is condemned and the proceedings before the DB mere exigency for it to pronounce punishment.* (Emphasis added.)

The DB had duly considered the DC's report and affirmed the recommendations of the DC (refer to p 357 common core bundle of documents ('CCD') Vol 2). Therefore, we find no merit in this argument. The aforesaid Court of Appeal decision referred to above in our view reflected the correct approach the DC should take and we are in agreement with the reasoning of these two cases.

B. The High Court failed to apply its mind to the filing of an affidavit by the respondent in an appeal heard by the High Court from decision of the DB and

which act was to put in an uncertified notes of proceedings from a third party ie Bar Council (the intervener here) for the High Court to consider and which the High Court did (see p 5 of the first appellant's submissions)

[11] Item B of the arguments by both appellants raised the point that uncertified notes of proceedings put in by the Malaysian Bar in its affidavit in the proceedings in the High Court were considered by the High Court. The Court of Appeal in its judgment did not consider this issue.

[12] As we have already found that the DC has only to forward to the Director of Complaints, for onward transmission to the DB, its report pursuant to s 103C of the LPA read together with r 26 of the Rules 1994, which had been complied with in this case, we find this issue warrants no consideration by us as the DC's report was forwarded to the DB and was considered by the DB and affirmed (see CCB p 357 Vol 3).

C. The complaint to the DB was made by the respondent, an Advocate & Solicitor in his capacity as an Advocate & Solicitor for and on behalf of Saling bin Lau Bee Chiang and during the DC hearing Saling was not present to give evidence or be subject to cross-examination and the DC permitted and accepted the respondent to assume the role of the complainant

[13] The next issue ventilated by the appellants before us was tabulated in Item C of their respective submissions (see p 5 of the first appellant's submissions).

Section 103C(1) sets out the procedure the DC needs to follow in conducting its proceedings. The DC is the 'master of its own procedure' subject to statutory provisions and rules. Section 103C(1) provides:

> 103C(1) After hearing and investigating any matter referred to it, a Disciplinary Committee shall record its findings in relation to the facts of the case and according to those facts shall determine and make any one of the following recommendations to the Disciplinary Board ...

[14] The power to call persons to appear before it to give oral evidence in relation to the matter vests with the DC. If the DC feels the actual complainant is needed to give oral evidence then it is the prerogative of the DC to call the actual complainant to testify. If it had called Saling to give oral evidence and the DC refused to allow the appellants the right to cross-examine him, then the appellants would have a valid ground to raise. The DC is perfectly entitled to rely on the documents before it to come to its findings and recommendations. We refer again to the decision of the Court of Appeal in *Jerald Allen Gomez v Shencourt Sdn Bhd (Majlis Peguam, intervenor)* and to the judgment of Abdull Hamid Embong JCA (as he was then) at p 351 (MLJ); pp 99–100 (CLJ) whose

reasoning we agree with and we quote:

> Part VII of the LPA, and the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 do not provide for a detailed arrangement on the procedure for its hearing and investigation in a disciplinary matter. Rule 31 of the 1994 Rules however provides the chairman of the disciplinary board with powers to give directions to the disciplinary committee on the investigating tribunal on matters of procedure as he thinks fit. No such directions were given in the instant case. Rule 22 of the said Rules provides for the course of action that may be taken by the disciplinary committee in a situation where a party is absent at its hearing. It states:
>
> > 22 Absence of parties before Disciplinary Committee. Where on the date fixed for the hearing and investigation of the complaint the complainant or the advocate and solicitor concerned or both fail or fails to attend before the Disciplinary Committee, the Disciplinary Committee may, upon being satisfied that the notice of the hearing has been posted to the person or persons concerned, the hearing has been posted to the person or persons concerned. This repetition is an error in the MLJ version of the rule and unfortunately repeated in the quoted by the court proceed to hear and investigate the complaint in the absence of such person or persons without further notice to such person or persons and make its determinations and recommendations to the Disciplinary Board.
>
> It is clear therefore that the disciplinary committee may proceed to hear, investigate and determine the complaint even in the absence of either party. So there is nothing inherently irregular in reaching a decision in the absence of one of the parties, since the governing statute has provided for such a situation. The notes show that on 22 August 2002 when the representative of the respondent, one Dato' Lee Kam Yoong failed in his attempt to secure a postponement, the disciplinary committee went on to hear the appellant first. When the hearing was adjourned to the following day, Dato' Lee Kam Yoong was present and propounded the complaint against the appellant and was subsequently cross-examined by the latter. *In our view there is nothing irregular or unfair in the procedure adopted by the disciplinary committee. The proceedings although quasi-judicial in nature need not emulate the strict adversarial procedure practised in a criminal court. This is not a criminal trial but a disciplinary proceedings. So long as it is seen that 'fair play is action' to borrow Lord Morris' words, and that the procedures applied are just and fair, then, in this court's view, it cannot be said that the disciplinary committee had committed a breach of procedural fairness*. (Emphasis added.)

We have scrutinised the report of the DC and find nothing to indicate unfairness in terms of procedure and the manner in which the DC conducted itself. We would therefore dismiss this argument of the appellants.

[15] We next deal with issues raised in Items D and E of the respective submissions of the appellants.

D. The DC in coming to its conclusion relied on an interlocutory judgment by

Vernon Ong JC (then) in JB High Court Suit No 22–228 of 2009 (given on a burden of serious question to be tried)

E. None of the four complaints by Saling was proven on a standard of proof of beyond reasonable doubt (see p 5 of the first appellant's submissions)

[16] There is only one offence for which the LPA affixes punishment on an advocate and solicitor, ie 'misconduct'. Section 94(3) of the LPA sets out instances which constitute misconduct in a professional capacity and the punishments to be meted out are found in s 103C(1) of the LPA. The standard of proof is that of beyond reasonable doubt in view of the quasi criminal nature of these proceedings. Perusing through the DC report and its recommendations, there appears to have been no reference to the higher standard of proof required. We are of the view that the appellants' peers as the DC and the DB are the best persons to decide on the misconduct of the appellants and whether the standard of proof in any given case had been met.

[17] We refer to the decision of this court in *Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89 and to the judgment of Raja Azlan Shah CJ (as His Majesty then was) at p 91 para G left hand column to para A right hand column.

> The same point was taken before us, that there was not that high standard of proof as required in cases of this nature that the appellant had given a solicitor's undertaking in 'clear, unqualified and unequivocal terms': see *Bhandari v Advocates Committee*, *T Damodaran v Choe Kuan Him*. It was also urged before us that the appellant had merely said to Mr Balendran that as he had no authority to sign cheques etc for his father, he would speak to his father about paying on or before March, 21, and that if he had given any undertaking, there was no proof that he had given the undertaking personally, and in his *professional* capacity as a solicitor, in view of the father-son relationship between him and the defendant in the suit, out of which this matter arose. It is a question for the committee to decide, first, whether the facts alleged in the charge had been proved beyond reasonable doubt and secondly whether the appellant in relation to those facts, was guilty of such conduct. *The absence in the Committee's determination of any mention of the standard of proof does not justify an inference that it had failed to have regard to it. As a matter of fact that point was referred to in the very first paragraph of the appellant's written submission before the Committee and which is incorporated in p 126 of the appeal record. We have not the slightest doubt that that point was in the forefront of the Committee's consideration*. (Emphasis added.)

[18] The DC has made findings of fact that led to the principal finding of misconduct. The courts in our view should be slow to interfere with the findings of the DC affirmed by the DB as that function must rest solely with the DC as the appellants must best be judged by their peers as encapsulated in the LPA. We refer to the judgment of Raja Azlan Shah CJ (as His Majesty then

was) in *Au Kong Weng* at p 91 para H to p 92 para A and we quote:

> Where a solicitor, who is acting professionally for a client, gives his personal undertaking in that character to a third person, that undertaking may be enforced summarily, upon application to the court. Before this remedy can be pursued it must be shown that the undertaking was given personally and not merely as agent on behalf of the client; the undertaking must also be given by the solicitor, not as individual, but in his professional capacity as a solicitor.
>
> This passage omitting unnecessary words is from *Halsbury's Laws of England* (3rd Ed) at p 195 and was cited to the Disciplinary Committee.
>
> *Statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession.*
>
> *Following this trend, our Legal Profession Act 1976, has now entrusted the duty of seeing that members of the profession maintain the highest standards of probity which are demanded by a profession dealing with the rights properties and liberty of the people, to the members of the profession themselves. In our respectful view, it cannot be gainsaid that the members of the profession must be able to rely on the spoken word of each other and that a breach of this undertaking is a serious matter.* (Emphasis added.)

[19] We also make reference to the decision of the Court of Appeal in *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341 at pp 344–345, wherein His Lordship Gopal Sri Ram JCA (as he then was) said and we quote:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behavior. We would, in this context, express our agreement with the following passage in the *Guide to the Professional Conduct of Solicitors* issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:
>
> > *One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.*
>
> In our judgment, a court will be entitled to interfere only if what has been found by a Disciplinary Committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails. (Emphasis added.)

[20] We refer to Delhi High Court decision of *Council of the Institute of*

Chartered Accountants of India v Ved Prakash Verma And Anr Chat A Ref 5/2012 by way of analogy, and to the judgment of His Lordship Justice Rajiv Sahai Endlaw which we now quote at p 7 which we find instructive:

> 8. Though the jurisdiction of this Court under Section 21(6) of the Act is wide, without any restriction but *in our opinion, the findings of the members of the Disciplinary Committee of the petitioner and the views of the petitioner Council are entitled to great weight in light of the fact that the y are the experts with regard to the matters pertaining to profession of chartered accountants and know the intricacies of the profession on account of their personal experience. Moreover, the said bodies have been created to maintain a high standard of conduct and discipline amongst the members of the petitioner institute. Thus, unless gross violation or disregard of the provisions of the Act or the Regulations made thereunder or of the principles of natural justice and fairness is to be found, this Court would be slow to interfere with the finding of such professional bodies.* Reliance in this regard can be placed on *Chief Controller of Exports, New Delhi vs GP Acharya* AIR 1964 Cal 174, *Council of the Institute of Chartered Accountants of India vs CH Padliya* MANU/MP/0139/1976 and *The Council of the Institute of Chartered Accountants of India vs B Mukherjea* AIR 1958 SC 72 (though under the old Section 21). (Emphasis added.)

[21] We also refer to the case of *Law Society v Waddingham* [2012] EWHC 1519 (Admin) a decision of the High Court of England, Queen's Bench Division and to the judgment of Mr Justice Maddison which we now quote at p 14:

> 46. *Happily, the law in this regard is clear and uncontroversial, and I do not propose to embark on a detailed analysis of the authorities. In essence, when considering an appeal from a Solicitors Disciplinary Tribunal this court should accord considerable respect to the findings of and penalties imposed by the Tribunal, it being an expert and informed body; but as to the Tribunal's findings, this court is entitled to substitute its own view in an appropriate case, and it is also entitled to interfere with the Tribunal sentencing decision if it was clearly inappropriate* (See eg *Bolton v The Law Society* [1994] 1 WLR 512, 516 G–H, per Sir Thomas Bingham MR; *Otchere v The Law Society* [2008] EWHC (Admin) 2233 at paragraph 18 per Lloyd Jones J; and *Salsbury v The Law Society* [2008] EWCA Civ 1285 at paragraph 30, per Jackson LJ. (Emphasis added.)

In the decision of the High Court of England Queen's Bench Division, a decision in *Threlfall v General Optical Council* [2004] EWHC 2683 (Admin), Mr Justice Stanley Burnton said at p 8, and we quote:

> 21. *Because it does not itself hear the witnesses give evidence, the Court must take into account that the Disciplinary Committee was in a far better position to assess the reliability of the evidence of live witnesses where it was in issue.* In that respect, this Court is in a similar position to the Court of Appeal hearing an appeal from a decision made by a High Court judge following a trial. There is, however, an important difference between an appeal from a High Court judge and an appeal from a Disciplinary Committee. *The Disciplinary Committee possesses professional expertise that a High Court judge lacks. In the present case, the Committee comprised, in addition to the Chairman and a member nominated by the Privy Council, a dispensing*

optician, an optometrist, and an ophthalmologist. This Court appreciates that such a Disciplinary Committee is better qualified to assess evidence relating to professional practice, and the gravity of any shortcomings, and it therefore accords the decision of the Committee an appropriate measure of respect, but no more: see *Ghosh v General Medical Council* [2001] UKPC 29; [2001] 1 WLR 1915 at [33] and [34] and *Preiss v General Dental Council* [2001] UKPC 36; [2001] 1 WLR 1926 at [26]–[29]. These decisions make it clear that the Court should be more ready to overrule a disciplinary tribunal than previously appeared to be the case. *It however remains the position that an appellant must establish an error, of law or fact or of judgme nt, on the part* of the tribunal. (Emphasis added.)

[22] All these cases enunciate the point that the DC and/or like bodies, being a collegiate of peers, must be allowed to make findings of fact based on their experience in the profession under any given circumstances. The court must certainly not substitute themselves into the position of the DC in its review role. It is not for the court to say on the facts that the offending solicitor is guilty of professional misconduct or otherwise. So arguments on the merits should not be enunciated by the court and strong credence must be given to the findings of the DC which after all are subject to review by the DB which also consists of peers.

[23] We have considered the report of the DC and find there are no compelling grounds to interfere with its findings. The courts should only interfere with the finding of facts and recommendations of the DC in the following limited circumstances ie:

(a) when the findings are manifestly perverse;

(b) the DC/DB had failed as right thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against; and

(c) there had been breach of natural justice.

An instance of the above is best found in the Supreme Court of India's decision of *Bar Council of Andhra Pradesh v Kurapati Satyanarayana* Civil Appeal 3412 of 2001, and to the judgment of Bhan J which we now quote at pp 3–4:

The conduct of the Delinquent, who is an elderly gentleman, is reprehensible and is unbecoming of an advocate. It deeply pains us that the Delinquent who claimed to have practised for three decades and has worked as Government advocate for four years should have been guilty of such serious misconduct. The finding of the Disciplinary Committee of the Bar Council of India that there was no intention on the part of the Delinquent advocate to misappropriate the money of his client or to de-fraud him is not only unfounded and perverse but also lacks the serious thought which was required to be given by the Disciplinary Committee of the Bar Council of India in the discharge of quasi-judicial function while probing into the grave charge of professional misconduct by an advocate in the discharge of his duties as a counsel.

> We find the Delinquent guilty of grave professional misconduct. Having given our anxious consideration, we feel that having regard to the serious nature of misconduct the punishment of removal of his name from roll of the Bar Council would be the only appropriate punishment and accordingly we set aside the order passed by the Disciplinary Committee of the Bar Council of India and restore that of the Disciplinary Committee of the State Bar Council. (Emphasis added.)

For the aforesaid reasons we would dismiss these grounds raised by the appellants.

[24] Whilst we agree that this list of exceptions set out above may not be exhaustive and is dependent on the facts of each given case, applying these principles to our case, we find that the Court of Appeal had not exceeded its jurisdiction in not interfering with the findings of the DC and the DB, and this would not warrant a curial intervention.

[25] In our view in assessing misconduct the DC was perfectly entitled to rely on observations made by the learned judge in the Johor Bahru High Court bearing in mind that the DC was conducting an inquiry into the alleged misconduct of the appellant. It is not a question of the decision in that case rather the comments made by the Learned Judge as to misconduct and we now quote the relevant portions of His Lordship Vernon Ong J's (as he then was) grounds of judgment:

> [27] The R&M have been given the run-around by the defendants in their endeavour to obtain and secure the trust property. When contacted the first defendant said that he did not have any of the books and records of the trust; the documents were in the custody of one Hamzah of Kota Tinggi. The first defendant said that he did not have Hamzah's phone number. Later he said that he was unable to contact Hamzah as the phone reception in the area was bad. When the R&M went to Hamzah's house in Petrijaya, they found the first defendant's son, Dinesh Kanawagi present. Hamzah told the R&M that the books and records were not with him; that he could not remember, he was uncertain and that the books and records may be in Petaling Jaya where he lived with his children. When Hamzah was told that the first defendant said that the books and trust records were with Hamzah, Dinesh Kanawagi who was present said he had no knowledge of such statement. However, when the first defendant made the statement to the R&M, Dinesh was seated next to the first defendant. When the R&M asked Dinesh for the first defendant's phone number, Dinesh said that he did not have his father's telephone number.
>
> [28] Subsequently on 24 April 2009 the first defendant informed the R&M that the accounts of the trust was handled by one K Siva Lingam. When contacted K Siva Lingam informed that he did not have any books, records or documents of the trust and that he worked for TCMK Associated who did the audit. TCMK Associated's role was not disclosed to the R&M by the first defendant. When contacted TCMK

Associated informed the R&M that they did not have any books or records of the trust and that the original ledger, payment vouchers and bank statements of the trust are with the trustees.

[29] The R&M have not received any documents from the defendants. All discoveries made by the R&M were made without any assistance from the defendants. The first defendant's excuse is that there was a fire at his office. The fire in May 2007, however, does not explain the total absence of the records for the rest of 2007, 2008 and early 2009. RM435,451.18 was withdrawn from the Agro Bank account between 12 May 2008 and 9 April 2009 with all the withdrawal slips signed by the first defendant and second defendant. The 27 properties were purchased in 2008. Notwithstanding that these are post-fire transactions no documents have been furnished by the defendants. However, on 13 August 2009 some documents have since emerged including a letter from ARB, resolutions of the trust, a letter to the Ketua Pengarah Jabatan Hal Ehwal Orang Asli and a reply thereto. This shows that the defendants are in possession of documents belonging to the trust but have clearly refused to hand them over to the R&M.

[30] The first defendant has continued to act in defiance of the R&M order. For example, on the return of the perfected deed of receipt and reassignment he states that 'my solicitors are pursuing the matter to ensure its completion as soon as possible'. He has given instructions to solicitors in respect of the 27 properties despite the fact that the R&M had been appointed (para 31, defendant's affidavit in reply dated 13 August 2009).

[31] Further the defendants have retaliated against those seeking to obtain and secure the trust property. The defendants filed a counterclaim against a number of parties — (i) G Ragumaran, solicitors for the plaintiffs; (ii) Renu Zachariah & law firm, solicitors for the R&M; (iii) John Verghis, an agent of the R&M; (iv) Khoo Pek Lin and Folks Corporation of which the R&M is a director. The defendants have failed to obtain leave of the court to file the action against the R&M and his agents; the R&M being an officer of the court.

[32] *In conclusion, all the above points to the mismanagement of the trust by the defendants. There is a lack of accountability and proper keeping of records. It appears that the trust has been run without any proper supervision and control. The situation is clearly undesirable as the trustees of a trust are acting in a fiduciary capacity. The conduct of the defendants in refusing to cooperate with the court appointed R&M is inexcusable. The trust is for the benefit of all the beneficiaries. In discharging their duties as trustees the defendants are bound by the high standards of duty of care. Plainly, this is not the case. They have engaged in self-dealing. On the whole of the evidence as adduced by the affidavits there is a real risk that the trust property is in jeopardy.* (Emphasis added.)

For the aforesaid reasons we would dismiss the grounds advanced by the Appellants.

F. The DB/DC had no jurisdiction to register/set up and inquire into this complaint for the acts complained of were acts done by the appellants not in their professional capacity or otherwise (see p 5 of the first appellant's submissions)

[26] The last head of submissions is contained in F in bold in the written submissions of the appellants. The quintessence of the arguments is that the complaints against them were not acts done in their professional capacity. Section 94(3) of the LPA has defined misconduct and the key words are 'or otherwise which amounts to grave impropriety'. A string of cases have interpreted of these words so as to cast the net of misconduct widely. We now quote an excerpt from Malayan Law Journal, *Words, Phrases and Maxims* found on the Malayan Law Journal website which we now quote:

> *The words 'or otherwise' do not appear in s 85 of the Legal Profession Act (Cap 217, 1970 Ed) of Singapore but, in view of other provisions of the Act, namely ss 86, 87 and 88 the Inquiry committee and the Council of the Law Society had jurisdiction in regard to a complaint of misconduct otherwise than in a professional capacity; see Law Society of Singapore v Ang Boon Kwong Lawrence* [1993] 1 SLR 522. *An advocate and solicitor may be disciplined even though the conduct or the act in question had nothing to do with his character as a solicitor; see Re Gopalan Nair* [1993] 1 SLR 375. *However, see the case of WE Balasingam v The Bar Council* [1986] 1 MLJ 334 *mentioned in the note to sub-s 3(a) (infra) regarding the phrase 'conviction of a criminal offence which makes him unfit to be a member of his profession'. The court had decided that for that provision to apply , the offence must have been committed in a 'professional capacity'.* (Emphasis added.)

[27] The following authorities give some insight on how the court will look at the facts of each case and in applying the words 'or otherwise' to construe misconduct under s 94(3) of the LPA even though the act complained of was not specifically done in their professional capacity. In the case of *Law Society of Singapore v Heng Guan Hong Geoffrey* [2000] 1 SLR 361; [1999] 3 SLR (R) 966 a decision of the Singapore High Court at p 967 it was held:

> (2) Heng's conduct as alleged in the charge under s 83(2)(b) of the Act was dishonourable to him as a person and as an advocate and solicitor. Acting without express consent and authority and in a manner opposed to a client's interest would be grossly improper conduct. Heng's motive was to continue dealing dishonestly with the properties and such conduct and motive was not merely grossly improper conduct but was sufficient to constitute fraudulent conduct in the discharge of Heng's professional duties under s 83(2)(b) of the Act.
>
> (3) The standard of judgment to be applied to a solicitor's misconduct under s 83(2)(h), as in a case under s 83(2)(a), was a standard fixed by the court and not by the standard of peer judgment.
>
> (4) *Unlike 'grossly improper conduct' under s 83(2)(b) of the Act, 'conduct unbefitting an advocate and solicitor' under s 83(2)(h) was not confined to misconduct in the solicitor's professional capacity but also extended to mis conduct in the solicitor's personal capacity.*
>
> (5) *Heng's whole course of conduct was calculated to enable him to obtain large sums of money from various parties through dishonest means. Such dishonest conduct would tend to bring the profe ssion as a whole into disrepute and was clearly unbefitting of an advocate and solicitor as a member of an honourable profession.*
>
> (6) *Where an advocate and solicitor had been proven to have acted dishonestly, whether*

or not leading to criminal proceedings and criminal penalties, the court would invariably order that he be struck off the roll. In the present circumstances, the only suitable penalty to be imposed was striking off the roll. (Emphasis added.)

[28] We refer also to an English Court of Appeal decision in *In Re Weare, A Solicitor* [1893] 2 QB 439 where it was held:

That a solicitor may be struck off the roll for an offence which has no relation to his character as a solicitor, the question being whether it is such an offence as makes a person guilty of it unfit to remain a member of the profession. Conviction for a criminal offence prima facie makes a solicitor unfit to continue on the roll; but the Court has a discretion, and will inquire into the nature of the crime, and will not as a matter of course strike him off because he has been convicted; and the Court considered that in the present case the nature of the offence was such that the solicitor ought to be struck off the roll. (Emphasis added.)

We refer to another decision of the High Court of Singapore, in *Re Gopalan Nair* [1993] 1 SLR 375; [1992] 2 SLR (R) 969, and we now quote from the judgment of Chao Hick Tin J at p 383 (SLR); p 978 (SLR (R)):

[19] We do not think it could be any clearer that the respondent was talking about his profession. Indisputably he was taking to task another member of his profession. As was stated in his first letter, he was raising a matter which, in his view, concerned his profession.

[20] *Section 85(3) of the Act provides that the AG may at any time refer to the Society 'any information touching upon the conduct of an advocate and solicitor in his professional capacity'. We do not think it is possible, nor is it desirable, to define in what circumstances an act of an advocate and solicitor would be an act done in his professional capacity. But what we would unhesitatingly declare is that the proposition put forward by the respondent's counsel, that an advocate and solicitor could only act in his professional capacity when he is acting for a client is clearly too narrow. We would say that that is only one instance, albeit a very obvious one, where an advocate and solicitor is acting in his professional capacity. But that is not to say there could not be other circumstances.* (Emphasis added.)

[29] In our view, the word 'otherwise' in the phrase 'in a professional capacity or otherwise' is wide enough to include acts or omissions in any capacity other than as an advocate and solicitor. In any event, the term 'misconduct' is expanded in meaning to include the circumstances set out in paras (a)–(o) of s 94(3) of the LPA. When you are a practising advocate and solicitor, and you act as a trustee or a director of a company and allegations of breach of trust and/or fiduciary duty and/or of conspiracy are levelled against you, then if the DC finds you guilty of conduct unbefitting of an advocate and solicitor in relation to such trust and /or duty (see s 94(2) of the LPA), you would certainly come within para (o) of s 94(3) of the LPA. Under that paragraph, conduct which is unbefitting of an advocate and solicitor comes within the definition of 'misconduct'.

[30] In light of our findings we dismiss the appeal of the second appellant with costs.

[31] As to the first appellant, having given due consideration to the first appellant's role in the scheme, we are of the view that the principle of proportionality in meeting out sentences applies. The DC and the DB were harsh in their recommendation and order that the first appellant be struck off the Rolls. We refer to the judgment of the Court of Appeal in *Majlis Peguam Malaysia v Hari Krishnan a/l Jeyapalan* [2017] 1 MLJ 770 which followed the English decision of *In re A Solicitor* [1956] 1 WLR 1312 and the views expressed therein by Lord Goddard CJ and quoted at p 12 of the judgment which we adopt and agree with and we now quote:

> As I have said, if there was any suggestion against the professional conduct of the solicitor, we should only interfere in the most extreme cases, but the court has carefully considered the representations made on both sides and they are quite satisfied that, bearing in mind the finding of the committee that the appellant was guilty of conduct unbefitting a solicitor, which of course is not appealed against, the order is one which is too severe considering the nature of the offence which was proved. *It was a shocking offence, no doubt, from a social point of view that a man should act in this way, but in one sense it is no worse in a solicitor than in anybody else and it is not an offence which can be passed over. We entirely agree that the committee did not think that they were bound to pass this particular sentence. The expression which they use is one very well known to judges and chairmen of quarter sessions; they very often say they cannot overlook the offence and must pass a certain sentence. Having given this case the fullest and most anxious consideration, we have come to the conclusion that we shall set aside the order striking off the Roll and substitute therefor a sentence of suspension for two years.* (Emphasis added.)

[32] We now make reference to a few English cases in dealing with the principles of sentencing in this regard. We refer to the Court of Appeal decision of *Bolton v Law Society* [1994] 2 All ER 486 where His Lordship Thomas Bingham MR (as he then was) held and we quote at pp 491–492:

> It is required of lawyers practising in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness. That requirement applies as much to barristers as it does to solicitors. If I make no further reference to barristers it is because this appeal concerns a solicitor and where a client's moneys have been misappropriated the complaint is inevitably made against a solicitor, since solicitors receive and handle clients' money and barristers do not.
>
> Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently,

particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation. If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind would the tribunal be likely to regard as appropriate any order less severe than one of suspension.

It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires.

Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he ha s learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But

none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears, likely to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any indiv idual member. Membership of a profession brings many benefits, but that is a part of the price. (Emphasis added.)

[33] Next we refer to another English Court of Appeal decision of *Salsbury v Law Society* [2008] EWCA Civ 1285 and to the judgment of Jackson LJ which adopted the principles in *Bolton* which we now quote at p 498:

> [30] From this review of authority I conclude that the statements of principle set out by the Master of the Rolls in *Bolton*'s case remain good law, subject to this qualification. In applying the *Bolton* principles the Solicitors Disciplinary Tribunal must also take into account the rights of the solicitor under arts 6 and 8 of the convention. It is now an overstatement to say that 'a very strong case' is required before the court will interfere with the sentence imposed by the Solicitors Disciplinary Tribunal. *The correct analysis is that the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere.*

Having given due consideration to the facts of this case with regard to the first appellant we would order that the first appellant be suspended for five years rather than be struck off from the Rolls.

[34] We would urge the DC in recommending the punishment to be meted out to give brief reasons as to why the DC had recommended the particular punishment meted out bearing in mind the DC had options available, and the courts must be in a position to examine the same to decide whether the pendulum for punishment had swung too far in favour of striking off the Rolls.

[35] Therefore, for the first appellant, we order that:

(a) the appeal of the first appellant be allowed in part;

(b) the order of the DB be varied to read that the first appellant be suspended from practice for a period of five years from 7 July 2012; and

(c) no order as to costs.

[36] As for the second appellant, we would order that the appeal be dismissed with costs of RM10,000 to the respondent subject to allocator and deposit to be refunded to the second appellant.

Kanawagi's appeal dismissed and Dinesh's appeal allowed in part by varying the order of the DB to read that he be suspended from practice for a period of five years from 7 July 2012.

Reported by Ashok Kumar